CHIEW POH KIONG

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 41-03-2001-III(I)]
27 AUGUST 2001

CRIMINAL PROCEDURE: *Consent or sanction - Sanction - Lack of - Whether curable - Whether failure of justice occasioned - Criminal Procedure Code s. 422*

CRIMINAL PROCEDURE: *Charge - Amendment of - When should amendments be made - At what stage of trial should amendments be made - Whether accused pleaded guilty to amended charge - Criminal Procedure Code ss. 158, 159*

CRIMINAL PROCEDURE: *Conviction - Plea of not guilty to amended charge - Accused convicted without calling for him to enter upon his defence - Whether conviction valid*

CRIMINAL LAW: *Penal Code - Section 177 - Failure to furnish information in course of police investigation - Whether accused legally bound to furnish such information - Penal Code s. 43 - Criminal Procedure Code ss. 13, 14, 112*

On 27 July, 1996, the conviction and sentence of the accused was quashed and a retrial was ordered. On 2 September 1996, the sanction of the deputy public prosecutor was given to prosecute for an offence of giving false information under s. 182 of the Penal Code (the PC).

The accused was brought to court on 7 October 1996 and on 20 November 1997. The charge was amended to one under s. 177 of the PC. The trial was fixed for 13 July 1998 but was adjourned from time to time. It finally commenced on 20 March 2000. Judgment was delivered on 11 October 2000 where the accused was convicted and sentenced to four months' imprisonment and fined RM500 with a one month default imprisonment.

The accused now appeals, the grounds being: (a) that the sanction given was for the offence under s. 182 of the PC and not the amended charge referring to s. 177 of the PC; (b) that the charge was amended in the course of reading the judgment; (c) that the accused was not legally bound to furnish the information, the subject-matter of the charge.

Held:

[1] The provision concerning sanction is in s. 129 of the CPC while the lack of sanction may be cured under s. 422 of the CPC provided it does not occasion a failure of justice. The matter of sanction does not involve any principle of general importance in the administration of justice. Since there was no failure of justice occasioned, the lack of sanction can be cured by s. 422 of the CPC. In any event s. 161 of the CPC allows the court to continue with the amended charge without the need for further sanction.

[2] The accused was legally bound to furnish information within the meaning of s. 177 of the PC when he was questioned by the police under s. 112 of the CPC. This means the obligation to furnish information was not confined to those cases or situations mentioned in ss. 13 and 14 of the CPC but would include cases where a person had been questioned under s. 112 of the CPC since the person is legally bound to answer the questions truthfully within the meaning of the term 'legally bound' in s. 177 as defined in s. 43 of the PC.

[3] According to s. 158 of the CPC, the court can amend the charge anytime before judgment is pronounced. Judgment in the context of a criminal case, would, involve at least the finding of guilt by the court and the pronouncement of a judgment means the reading in open court of this finding of guilt. Based on the facts of this case, the pronouncement of guilt was only made after the charge was amended. The amendment therefore was in order.

[3a] According to s. 158 (2) of the CPC, after the charge is amended, the amended charge is to be read and explained to the accused. This had been done. In fact the lower court proceeded with calling on the accused to plead to the amended charge and this was in compliance with s. 159 of the CPC.

[3b] However, after the accused pleaded not guilty to the amended charge, the court proceeded to commit him. The lower court should have asked both the prosecution and the defence as to whether any witnesses need to be further examined and thereafter called for the defence. Instead of doing that, he straightaway convicted the accused despite the plea of not guilty and without calling for him to enter upon his defence on the new charge. This clearly was not in accordance with the CPC and was therefore illegal.

[Appeal allowed. Conviction set aside. Accused called to enter defence upon re-amended charge.]

Case(s) referred to:
Empress v. Kassim Khan & Anor ILR 7 CaL 121 ***(refd)***
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(dist)***
Hassan Isahak v. PP [1948-49] MLJ Supp 179 ***(not foll)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(foll)***
Pitchaykutty v. PP [1961] MLJ 293 ***(not foll)***
Salleh & Anor v. Rex [1908] SSLR 27 ***(foll)***

Legislation referred to:
Criminal Procedure Code ss. 13, 14, 112(2), (3), 129, 158(2), 159, 161, 162, 422
Penal Code ss. 43, 177, 181, 182

Criminal Procedure Code [Ind], ss. 161, 118, 119

Other source(s) referred to:
Gour, *Indian Penal Code*, 1972, 9th edn, pp 231, 441
Gour, *Penal Law of India*, 1982, 10th edn, p 1526

For the appellant/accused - Anthony Tai; M/s Anthony Tai
For the respondent/PP - Masri Mohd Daud

Reported by Mariette Peters-Goh

JUDGMENT

Ian HC Chin J:

Introduction

Following the quashing on 27 July 1996 of the conviction and sentence of the accused Chiew Poh Kiong and following an order for his retrial, the sanction of the deputy public prosecutor was given on 2 September 1996 to prosecute for an offence of giving false information under s. 182 of the Penal Code. The accused was brought to court on 7 October 1996 to face a charge that was subsequently before the trial commenced amended on 20 November 1997. The charge under which the trial proceeded reads:

> That you on 21.1.1995 at about 10.15 am, at Anti Corruption Agency Office, Kuching, in the District of Kuching, First Division in the State of Sarawak being legally bound to furnish information in course of police investigation *vide* Kuching Central Police Report Station Report No:518/95 did give to a public servant, to wit, En. Mohd Yunus bin Sukimin attached to Anti Corruption Agency Sarawak an information in your statement dated 21.1.95 herewith marked as Lampiran "A" which you knew to be false and you have thereby committed an offence punishable under Section 177 of the Penal Code.

The words of the underlined part of the statement marked as lampiran "A" and referred to in the charge reads:

> ... Saya lihat isteri saya membuka beg tangannya sambil mengeluarkan sampul surat Borneo Hotel yang mengandungi wang bertanda berjumlah RM1,000.00 dan terus menyerahkan kepada Ah Lek (B1) dengan kedua-kedua tangan isteri saya. Ah Lek (B1) terus menyambut sampul berisi wang itu dengan tangan kanan dan pada masa yang sama juga tangan kirinya membuka laci meja beliau sebelah kiri atas dan memasukkan sampul surat berisi wang bertanda RM1,000.00 ke dalam laci mejanya. Setelah wang dimasukkan ke dalam laci tersebut dengan pantas tangan kirinya menutup laci tersebut semula.

The gist of that statement is that the accused said he saw his wife open her bag, took out a Borneo Hotel envelope containing marked RM1,000 and gave it to Ah Lek who quickly unlocked his drawer to put the envelope containing the money in.

The trial was fixed for 13 July 1998 but regrettably was adjourned from time to time for the most parts for no good reason. The trial finally commenced (before a deputy registrar sitting as a magistrate) on 20 March 2000, that is almost three and half years after the accused was first brought to the court. The trial was staggered because the deputy registrar, apart from his own duties as such had also to sit as the presiding magistrate for the case. Judgment was delivered on 11 October 2000 where the accused was convicted and sentenced to four months imprisonment and fined RM500 with a one month default imprisonment. I turn now to the grounds of appeal.

No Sanction For The Amended Charge

It will be recalled that the sanction was for an offence under s. 182 of the Penal Code and the original charge related to an offence under that section but it was amended to one under s. 177. No further sanction was issued. Though it was mentioned that the complaint talks of an offence under s. 181 there is nothing on this point as what is relevant is what the sanction and the charge which finally proceeded are all about. Mr. Anthony Tai, learned counsel for the accused, argued that there was no sanction for the amended charge for an offence under s. 177, which is common ground, and that is an illegality that cannot be cured under s. 422 of the Criminal Procedure Code (CPC).

Section 177 talks of furnishing false information to any public servant while s. 181 talks of making a false statement on oath to a public servant or person authorised to administer oath. As for s. 182 it talks of giving false information to a public servant with intent to cause him to use his lawful power to the injury of another person.

The provision concerning sanction is s. 129 of the CPC and the relevant part reads:

> 129. Sanction required for prosecution for certain offences.

(1) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance:

(a) of any offence punishable under sections 172 to 188….except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;

(2)... (3) ... (4) ... (5) ...

Since Mr. Masri bin Mohd Daud, learned deputy public prosecutor, is of the contention that the lack of sanction can be cured under s. 422 of the CPC, it is to that contention I turn to first. That section (though it is in the form after the amendment made in 1998 is in substance the same before its amendment) reads:

422. Irregularities not to vitiate proceedings.

Subject to the provisions contained in this Chapter no finding, sentence or order passed proceed or made by a Court of competent jurisdiction shall be reversed or altered on account of:

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

The original section was the subject (among other matters) of decision in the case of *Joginder Singh v. PP* [1984] 2 MLJ 133 where Ajaib Singh J held that by virtue of s. 422 a conviction should not be set aside on account of the want of sanction unless it has occasioned a failure of justice. In coming to that decision the judge refused to follow *Hassan Isahak v. PP* [1948-49] MLJ Supp 179 which held that the absence of sanction renders the proceedings null and void and *Pitchaykutty v. PP* [1961] MLJ 293 which similarly held proceedings without sanction to be null and void. He disagreed with the two decisions for various reasons. One is that they did not take into consideration the earlier case of *Salleh & Anor v. Rex* [1908] SSLR 27 which held that the want of sanction does not vitiate a conviction unless there is evidence of a failure of justice. Another reason is that the judge in *Pichaykutty v. PP* though he followed *Hassan Isahak v. PP* had questioned its correctness. Yet another reason was because a host of Indian decisions had decided otherwise. I would respectfully follow *Joginder Singh v. PP* to say that the lack of a sanction can be cured since there is an express provision for doing that in s. 422 of

the CPC. There was no failure of justice occasioned in this case. Furthermore, the accused was defended by Mr. Tai and he did not raise any objection during the trial as regards the want of sanction, a matter which this court took into consideration as did the court in *Salleh & Anor v. Rex*. In so far as *Harun Abdullah v. PP* [1998] 3 CLJ 184 CA is concerned where it was held that s. 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice, that case involves the question of the standard of proof, that is, whether *prima facie* or beyond reasonable doubt, for establishing a case for an accused to answer and there was a failure to apply the proper standard and that failure could not be cured by invoking s. 422 of the CPC. The present case is not concerned with the standard of proof but with the question of sanction. Furthermore, the matter of sanction, in my view, does not involve any principle of general importance in the administration of justice. In any event, as correctly pointed out by Mr. Masri, s. 161 of the CPC allows the court to continue with the amended charge without the need for further sanction. Section 161 says:

> 161. Stay of proceedings if prosecution of offence in altered charge requires previous sanction
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> If the offence stated in the new or altered or added charge is for prosecution of which previous sanction is necessary the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charged is founded.

It will be recalled that sanction was obtained for a charge under s. 182 of the Penal Code and the charge was amended to one under s. 177 both of which relates to the same facts surrounding the furnishing of false information. Therefore, as provided in s. 161, no further sanction is required.

Accused Was Convicted On A Plea Of Not Guilty

The prosecution concluded its case after calling five witnesses and the court after hearing submissions ruled on 27 July 2000 that the accused has a case to answer. The court then sat on 25 August 2000 to hear the defence but on that day learned counsel for the accused told the court that the accused wishes to remain silent, and the prosecution and the defence then stated that they adopt the submissions already made as their final address. Learned defence counsel also said this:

> If there is a maximum evaluation of the prosecution case at the end of the prosecution, then the silence on the part of the accused would entail a conviction. If, however, there [was no] maximum evaluation of prosecution case at the end of the prosecution case, then the Court would have to consider all the evidence of the prosecution and then decide whether or not the prosecution has proved its case beyond a reasonable doubt.

The court then adjourned to 29 September 2000 for judgment. At this hearing another counsel stood in for the learned counsel for the accused as he was engaged in another court. The court then proceeded to read the judgment and the following part is relevant for the present issue, *viz.*:

> Having considered the submission of the defence counsel and the prosecution and having gone through the evidence of the prosecution again, I am of the view that the amended charge in this case ought to be re-amended as the evidence adduced by the prosecution as a whole tended to support beyond reasonable doubt a charge under the second clause of section 177 of the Penal Code. Thus, I am minded to amend the charge at this stage as the accused is not prejudiced by the amendment since it is still under the same section 177 of the Penal Code as oppose to different one with heavier penalty or severe sentence (*Public Prosecutor v. James Tan* [1983] 2 MLJ 173 and *Public Prosecutor v. Joehari bin Abdullah & Anor* [1996] 1 CLJ 100, *Lim Teck Seng v. Reg* [1957] 23 MLJ 71, and *Public Prosecutor v. Salmah Binte Abdullah* and *Public Prosecutor v. Ong Eng Kiat* [1947] 13 MLJ 178). This is to add the words, "and the information which you were bound to give was in respect to the commission of an offence" after the word "..false.." in the amended charge consistent with the second clause of the section 177 (see *Law of Crime*, *supra* pg 450).
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> The amended charge is thus re-amended and reads:
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> > That you on 21.1.1995 at about 10.15 a.m. at Anti Corruption Agency Office, Kuching, in the District of Kuching, First Division, in the State of Sarawak, being legally bound to furnish information in the course of police investigation *vide* Kuching Central Police Station Report No.518/95, did furnish an information to a public servant, to wit, En. Mohd Yunus bin Sukimin attached to Anti Corruption Agency Sarawak, an information as in your statement dated 21.1.95 herewith marked as Lampiran "A" which you knew to be false, **and the information which you were bound to give was in respect to the commission of an offence** and that you have thereby committed an offence punishable under section 177 of the Penal Code.
>
> The re-amended charge read and explained to the accused in Chinese Hakka. He understands the re-amended charge. He pleads not guilty.
>
> As the accused pleads not guilty, and in view of the overwhelming evidence against him on the re-amended charge, as the offence having been proved beyond reasonable doubt, I find him guilty as charged on the re-amended charge and I enter his conviction.

The issue calls for a consideration of whether the charge can be amended at that stage, that is in the course of reading a judgment. The amendment of a charge is dealt with by s. 158 of the CPC.

> 158. Court may alter or add to charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

It would appear from that section that the court can amend the charge any time before judgment is pronounced. It will be recalled that in this case, the charge was being amended towards the end of the reading of the judgment but before the conviction was pronounced. Can the amendment then be regarded as having been made "before judgment is pronounced"? Judgment in the context of a criminal case would, in my view, involve at least the finding of guilt by the court and the pronouncement of a judgment means the reading in open court of this finding of guilt. It is obvious from the judgment itself that the pronouncement of guilt was only made after the charge was amended. Therefore, the amendment was in order. This brings me to the next question of what the court was required to do after the charge was amended. Section 158(2) of the CPC comes into play and it requires the amended charge to be read and explained to the accused. This the lower court appeared to have done. In fact the lower court proceeded with calling on the accused to plead to the amended charge and this was obviously done in compliance with s. 159 of the CPC which says:

159. When trial may proceed immediately after alteration or addition.

If a charge is framed or alteration or addition made under either of the last two preceding sections, the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

That provision envisages that there should be a trial when the accused pleads not guilty to an amended charge. In this case the accused pleaded not guilty but the lower court nevertheless proceeded to convict him. I can find no provision in the law where the court can find an accused guilty of an offence after he has pleaded not guilty to an amended charge. In the present case, the lower court must have been under the misconception that the choice of the accused to remain silent after being called to enter upon his defence still pertains. But that was in relation to the previous charge. There is now a new amended charge which the accused had pleaded not guilty and following which the prosecution and the accused may recall witnesses for examination under

s. 162 of the CPC. The lower court should have asked both the prosecution and the defence as to whether any witnesses need to be further examined and thereafter called for the defence. Instead of doing that he straightaway convicted the accused despite the plea of not guilty and without calling for him to enter upon his defence on the new charge. This is clearly not in accordance with the CPC and illegal. The conviction and sentence cannot stand and is therefore set aside. What remains to be decided is whether there is any impediment for calling for the accused to enter upon his defence. Learned defence counsel said the court cannot because a vital ingredient of the offence has not been established, which is that the accused was not shown to be a person who was "legally bound to furnish information".

Was The Accused Legally Bound To Furnish Information

It was contended by the accused that the persons who are legally bound to furnish information are only those mentioned in ss. 13 and 14 of the CPC. Those sections read:

13. Public to give information of certain matters.

(1) Every person aware:

(a) of the commission of or the intention of any other person to commit any offence punishable under the following sections of the Penal Code:
121, 121A, 121B, 121C, 122, 123, 124, 125, 126, 130, 143, 144, 145, 147, 148, 302, 304, 307, 308, 363, 364, 365, 366, 367, 368, 369, 382, 384, 385, 386, 387, 388, 389, 392, 393, 394, 395, 396, 397, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, and 460;

(b) of any sudden or unnatural death or death by violence or of any death under suspicious circumstances, or of the body of any person being found dead without its being known how such person came by death; shall in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the officer in charge of the nearest police station or to a police officer or the nearest penghulu of such commission or intention or of such sudden, unnatural or violent death or of the finding of such dead body as the case may be.

(2) If any person discovers any dead body and he has reason to believe that the deceased met with his death through an unlawful act or omission he shall not remove or in any way alter the position of the body except so far as is necessary for its safety.

14. Police officer bound to report certain matters.

Every police officer and every penghulu shall forthwith communicate to the nearest Magistrate or police officer not below rank of Inspector any information which he may have or obtain respecting-

(a) the occurrence of any sudden or unnatural death or of any death under suspicious circumstances;

(b) the finding of the dead body of any person without its being known how such person came by his death.

It was argued that since the offence of furnishing false information under s. 177 of the Penal Code is not one of those listed in s. 13 or s. 14 of the CPC, the accused is not a person who was legally bound to furnish information notwithstanding s. 112 of the CPC which says:

112. Examination of witnesses by police.

(1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) A police officer examining a person under subsection (l) shall first inform that person of the provisions of subsections (2) and (3).

(5) A statement made by any person under this section whether or not a caution has been administered to him under section 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

Learned defence counsel had in support of his proposition of the law cited the following passage in Gour's *Indian Penal Code*, 9th edn (1972), p. 441:

7. Furnishing false information. - Persons affected by this section are those who are under a legal obligation to assist public servants by furnishing them with information on stated subjects. Such obligation is cast on the public by Sec. 44 of the Code of Criminal Procedure and certain persons are under the additional duty imposed on them by Sec. 45 of the same Code. In both cases the persons there mentioned are legally bound to furnish information on the subject therein specified to the police. They are then bound to furnish that information to them. But the obligation is not universal for the public at large are under no obligation to keep the

police informed of facts, the knowledge of which may be to their advantage. The public were, at one time, under an obligation to answer truly all questions relating to a case under investigation by the police, but the only obligation the public are under now, since the passing of the present Criminal Procedure Code, is to answer questions relating to a case under investigation other than questions the answers to which would have a tendency to expose them to a criminal charge or to a penalty or forfeiture. This obligation of answering questions, does not imply the duty of furnishing information and it does not, therefore, expose one to the penalty of this action.

The Indian Criminal Procedure Code then has a s. 161 which reads like this:

161.(1) Any police-officer making an investigation under this Chapter or any police-officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions and answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

The court in *Empress v. Kassim Khan & Anor* ILR 7 CaL 121 had to consider the terms of ss. 118 and 119 of the Criminal Procedure Code (which are similar to s. 161, *supra*) which are, respectively, "shall answer all questions" and "shall be bound to answer all questions" and concluded that they do not constitute "an express provision of the law to state the truth within the meaning of s. 191 of the Penal Code since those terms do not impose any obligation on the persons to speak the truth." It will be noticed that our s. 112(3) carries an obligation to speak the truth. But, since that edition of the book the Indian Code of Criminal Procedure 1973 (which came into force in 1974) had changed the law by making obligatory for a witness to speak the truth (the term, *inter alia*, "truly" being added) when examined by the police under a section of the law, s. 161, which is in *pari materia* with s. 112 of the CPC. Consequently, Gour's *Penal Law of India*, 10th edn (1982) at p. 1526, added at the end to that paragraph (apart from amending the section numbers) the following sentence:

Under Sec. 161, Cr.P.C., 1973, the obligation to answer truly has been fixed.

The Malaysian CPC, s. 112(3), which is in *pari materia* with the Indian s. 161, binds a person making a statement thereunder to state the truth. Therefore, that passage of Gour, 9th edn, cannot be authority to say that a statement under s. 112 cannot be the subject of a charge under s. 177 of the Penal Code. In fact from another passage of the same author (9th edn.,

p. 231) it is clear that the determination of the meaning of the term "legally bound" must be done with reference to the s. 43 of the Penal Code which reads:

> The word "illegal" or "unlawful" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action.
>
> And in respect of the word "illegal, a person is said to be "legally bound to do" whatever it is illegal in him to omit.

The same author said: "The test to see whether a person is "legally bound" to give information to do anything else is not whether he is enjoined by the law to give such information or do such thing but to see whether the omission to do so would be "illegal" within the meaning of s. 43, i.e., is an offence under the Code, or is prohibited by law or is such as to give rise to a cause of action for a civil action. Thus the test is a negative one". Applying the test, it is clear that the accused was bound under s. 112(2) of the CPC to answer all questions put to him, that is, he was prohibited by the law, which is that section, from refusing to answer truthfully. Therefore, the accused was "legally bound to furnish information" within the meaning of s. 177 when he was questioned by the police under s. 112 of the Criminal Procedure Code. This means the obligation to furnish information is not confined to those cases or situations mentioned in ss. 13 and 14 of the CPC but would include cases where a person has been questioned under s. 112 of the CPC since the person is legally bound to answer the questions truthfully within the meaning of the term "legally bound" in s. 177 as defined in s. 43 of the Penal Code. This must be distinguished from s. 182 of the Penal Code which does not have the term "legally bound to furnish" but covers a case only of volunteering information as distinct from s. 177 of the Penal Code which deals with cases that involve a legal obligation.

Conclusions

In the premises, I allow the appeal and set aside the conviction and sentence. Instead, the accused shall be called upon to enter upon his defence to the re-amended charge.